



REPUBLIC OF KENYA

High Court at Bungoma

Civil Appeal 38 of 2005

FREDRICK JACOB SAKWA APPELLANT

VERSUS

STANDARD CHARTERED BANK RESPONDENT

RULING

The ruling is in respect to the Notice of Motion dated 15th January 2013 brought under Order 40 rule 1 of Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking orders:

- (a). The motion be certified as urgent and heard *ex parte* in the first instance as the applicants moveable property comprised in land parcel **No. E. Bukusu/S. Kanduyi/4162** has been advertised for sale by public auction on 18th January 2013 irregularly as there are injunctive orders issued by the subordinate court restraining the sale that the respondent has no statutory power of sale on the property.
- (b). That a temporary injunction do issue restraining the respondent, its agents, servants from advertising or offering for sale the applicants property till this motion is heard and determined.
- (c). The respondents be summoned to show cause why they are in flagrant violation of injunctive orders issued by the lower court.
- (d). Costs of this application be granted.

The application is supported by five grounds on the face of it and on the affidavit of the applicant – **Fredrick Jacob Sakwa**. Paragraph 1 – 3 of the grounds refers to an injunctive order given by another court. No such order was annexed to this application. This is not the proper cause for the applicant to ventilate the issue of the respondent being in breach of the said order as he has brought in his prayer (c). He ought to commence contempt proceedings in the court which issued the order. I do proceed to strike out prayer of the notice of motion for the reasons given.

Prayer (a) was already dealt with immediately the file was placed before me. I certified the matter as urgent and early date for hearing given besides orders of interim injunction. What remains for determination now is prayer (b). I quote prayer (b) as below;

“That a temporary injunction do issue restraining the respondent its servants and agents from advertising or offering for sale the applicants property till this motion is heard and determined”
(underline mine).

These are the orders I granted on 16th January 2013 when the applicant through his counsel Ms. Wakoli

appeared before me ex parte. The matter was then set down for inter partes hearing.

The applicant in effect has tied this court's hand to go beyond the prayers in his notice of motion. Ms. Wakoli in her oral submission before court submitted that the applicant is seeking injunctive relief pending hearing and determination of an appeal. No copy of the defence to the counter-claim appealed against is annexed to this application to enable this court deduce if it is in respect to the exercise of the statutory power of sale neither is a memo of appeal annexed. What is annexed is proceedings in Bungoma CMCC NO. 278 of 1997. The proceedings do not help the applicant's case much because the ruling struck out the defence on basis that it was filed out of time. Its' content was not referred to in those proceedings. If the mentioned documents had been annexed, the court may have exercised its discretion under Sec. 3A of Civil Procedure Act and Article 159 to grant injunction pending appeal whether prayed for or not given for the ends of justice.

The respondent has opposed the application and filed a replying affidavit. I will not comment on it, because of the incompetence of this motion which then does not allow this court to deal with it on merits or otherwise. In the case of Asia Resources (K) EPZ LTD. Vs. Rafiki EPZ Ltd. [2005]eKLR with similar prayers sought and I quote the wording,

“Pending hearing and determination of application” was dismissed.

The trial judge, Justice L. Njagi in that case quoted Justice Onyango-Otieno in the case of Southern Credit banking Corporation Ltd. Vs. Charles Wachira HCC No. 1780 of 2000 (Milimani) where Justice Onyango-Otieno had this to say,

“It will be seen that the applicant is seeking injunction only until application is heard and determined. Clearly, this prayer which is the main prayer in this application pre-supposes that another prayer possibly for injunction pending the finalization of the suit which was to be heard and determined was made in the application. No such prayer was brought. I don't think I can draft a prayer for a party and decide on it. I can only decide on prayer before me. (Emphasis mine).

Similarly in the court of appeal decision in Chalicha FCS Ltd. Vs. Odhiambo & 9 others [1987] KLR pg 182 the court held;

“Cases must be decided on the issues on record. The court has no power to make an order, unless it is by consent which is outside the pleadings. In the instance the issues raised by the judge and the order there on was a nullity.

In conclusion therefore this application fails as this court's hand is tied not to grant the orders not prayed for in respect to prayers of injunction pending hearing and determination of the appeal. I have already indicated that prayer (c) of the application fails because this motion is not the proper fora for the applicant to deal/bring out the disobedience by the Respondent of an order issued by a court other than this court (the order of the court below in the present case). The application is thus struck out with costs to the Respondent.

RULING DATED, SIGNED, READ and DELIVERED in open court this 14th day of March 2013.

A. OMOLLO

JUDGE.